

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs July 24, 2007

LARAIEL WINTON v. STATE OF TENNESSEE

Appeal from the Criminal Court for Knox County
No. 78126 Ray L. Jenkins, Judge

No. E2006-02392-CCA-R3-PC - Filed August 29, 2007

The petitioner, Laraiel Winton, pro se, appeals the Knox County Criminal Court's denial of his petition for post-conviction relief which alleged that he was denied the effective assistance of counsel on direct appeal. On appeal, he alleges that the trial court erred in denying him relief and that the trial court failed to make sufficient findings of fact in its order denying relief. Following our review, we agree that the trial court failed to make sufficient findings of fact and further conclude that the trial court's erroneous restriction of the presentation of evidence resulted in a denial of the petitioner's right to a full and fair hearing regarding the allegation of ineffective assistance of appellate counsel. Therefore, the judgment of the trial court is reversed and the case is remanded for further proceedings consistent with this opinion.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Reversed and Remanded

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and J. C. MCLIN, JJ., joined.

Mark Stephens, District Public Defender; Aubrey L. Davis, Assistant District Public Defender (at trial); Laraiel Winton, pro se, Wartburg, Tennessee.

Robert E. Cooper, Jr., Attorney General & Reporter; Rachel West Harmon, Assistant Attorney General; Randall E. Nichols, District Attorney General; and Leon Franks, Assistant District Attorney General, for appellee, State of Tennessee.

OPINION

The petitioner was convicted of one count of attempted aggravated robbery and one count of especially aggravated kidnapping. He received a sentence of twenty-five years as a violent offender for the especially aggravated kidnapping conviction concurrent with a six-year sentence as

a Range I, standard offender for the attempted aggravated robbery conviction. His convictions were affirmed on direct appeal. State v. Carlos Montes Waters and Laraiel J. Winton, No. E2001-00882-CCA-R3-CD, 2003 WL 824278 (Tenn. Crim. App. Mar. 6, 2003). Procedurally significant to our analysis on this appeal is the fact that the petitioner, through new counsel at the motion for new trial hearing and on appeal, alleged that he was denied the effective assistance of counsel at trial.

On September 10, 2003, the petitioner filed a petition for post-conviction relief alleging the ineffective assistance of trial counsel, prosecutorial misconduct and the ineffective assistance of appellate counsel. On July 15, 2004, the trial court dismissed the petition without a hearing based upon a finding of a previous determination and stated from the bench “that’s the end of it.”¹ The petitioner appealed and the Assistant State Attorney General filed a motion in this court to remand the case to the trial court for a hearing on the ineffective assistance of counsel. On June 15, 2005, this court granted the state’s motion and ruled as follows:

the state correctly notes that in this post-conviction petition, the petitioner raises claims of ineffective assistance of both trial counsel and appellate counsel. The state submits that although the issue of trial counsel’s performance has been previously determined, the petitioner properly raised the claim of ineffective assistance of appellate counsel in his petition and is entitled to have it considered by and determined by the trial court. This court agrees. As the petitioner has had no previous opportunity to raise the issue of ineffective assistance of appellate counsel, he is entitled to a consideration of the merits of this claim.

On remand, the trial court appointed counsel and an evidentiary hearing was held on May 18 and May 24, 2006.²

At the onset of the evidentiary hearing both the trial court and the assistant district attorney general questioned the issues that should be addressed at the evidentiary hearing. Appointed counsel tried steadfastly to explain the purpose of this court’s remand but was met with comments by the trial court and the assistant district attorney general such as the following:

THE COURT: . . . I guess the Court of Criminal Appeals can overrule these laws that you’re only entitled to one post-conviction relief.

MR. FRANKS: Right. It didn’t use to come back on appellate counsel, now it does.

¹ Neither the July 15, 2004 order nor the transcript is included in the record on appeal. However, this court quoted the trial court’s language in its June 15, 2005 order remanding the case for consideration on the merits.

² This court also notes that the trial court did not rule on the petition until October 6, 2006, 128 days after taking the petition under advisement on May 24, 2006. This ruling was subsequent to the September 5, 2006 filing of a Pro Se Motion for Report of Status on the Final Disposition of Post-Conviction Petition by the petitioner and well exceeded the sixty but no more than ninety days allowed pursuant to Tennessee Code Annotated section 40-30-111(d) for the final disposition of a post-conviction petition.

This is just one example of many exchanges that permeate the transcript of the evidentiary hearing. Additionally, the assistant district attorney general successfully but erroneously argued that the petitioner could only present evidence regarding the ineffective assistance of appellate counsel pertaining to the presentation of the appeal of a jury instruction issue and a speedy trial issue – the two issues raised in the initial petition, ignoring the amendment made to the petition that includes an allegation of the ineffectiveness of appellate counsel in pursuing the ineffective assistance of trial counsel claim on direct appeal. Under these constraints, the petitioner attempted to present evidence supporting his claim of ineffective assistance of appellate counsel, but was limited in his ability to do so. The trial court's order denying relief reads as follows:

This matter was returned to the Trial Court to determine the propriety [sic] of counsel's action in the Appellate Court. This Court has labored under the perhaps erroneous delusion that the Trial Court was for the determination of counsel's effective assistance in the Trial Court, while counsel's effective assistance in the Appellate Court was to be gaged [sic] by the Appellate Court. If this Court must make a finding, it held that counsel's effective assistance as relates to Appellate performance does not violate any principle under Baxter v. Rose.

In passing, it is noted that the defendant is not entitled to effective assistance of counsel in a Post-Conviction Relief hearing and it would seem to be an anomaly requiring a higher standard in the Appellate Court. At any rate, this court finds no violation.

On appeal, the petitioner, now acting pro se, contends that the trial court erred in finding that he was not entitled to post-conviction relief and also claims that the case should be reversed and remanded due to the trial court's failure to make adequate findings pursuant to Tennessee Code Annotated section 40-30-111(b). The state contends that both issues are waived for the petitioner's failure to support his issues with argument and citations to the record and, alternatively, that the trial court correctly denied the petition and made adequate findings of fact.

Regarding the state's waiver argument, this court concludes that it is refuted by the record in this case. The pro se petitioner's brief to this court adequately cites to the record and cites to authority in support of his position on appeal. Regarding the adequacy of the trial court's findings of fact, we cannot discern any findings of fact in the trial court's order, but we do conclude that the order of the court consists solely of a legal conclusion that the petitioner was not denied the effective assistance of counsel on appeal.

Furthermore, this court has serious concerns regarding the conduct at the evidentiary hearing in this case. A review of the record leads to the conclusion that the trial court operated under some

misapprehension of law as applied to the review of the merits of the post-conviction petition.³ The trial court erroneously believed that the petitioner was foreclosed from presenting proof related to the deficient performance of appellate counsel because the petitioner had raised the issue of the ineffective assistance of trial counsel on direct appeal. This misapprehension of the law led to the improper limitation of proof concerning the allegations of the petition. In a post-conviction action due process requires that the petitioner have “the opportunity to be heard at a meaningful time and in a meaningful manner.” Stokes v. State, 146 S.W.3d 56, 61 (Tenn. 2004). We cannot conclude that the petitioner was afforded that opportunity. See, e.g., Montea Wilson aka Marcus Floyd v. State, No. W2004-01881-CCA-R3-PC, 2005 WL 2333588, at *5 (Tenn. Crim. App. Sept. 21, 2005) (“it appears the post-conviction court misunderstood the petition as seeking to revisit the substantive” issues from the direct appeal). Therefore, the judgment of the trial court is reversed and this matter is remanded for a full and fair hearing on all issues relating to the ineffective assistance of appellate counsel as alleged in the post-conviction petition and amendment.

Upon remand, the trial court is directed to afford the petitioner a full evidentiary hearing regarding all claims of ineffective assistance of appellate counsel. This court notes that one aspect of the petitioner’s allegation of ineffective assistance of appellate counsel necessarily includes any alleged deficiencies committed in appellate counsel’s presentation of issues on appeal relative to the performance of trial counsel. While it is true that this court concluded on direct appeal that the petitioner “ha[d] not shown deficient performance on the part of trial counsel,” Waters, 2003 WL 824278, at *21, it is the petitioner’s insistence in his post-conviction petition that this conclusion resulted from the deficient performance of appellate counsel in presenting the issue of trial counsel’s ineffectiveness. Therefore, at the post-conviction hearing the petitioner must be allowed to present evidence relevant to the effectiveness of his trial counsel. Otherwise, the petitioner would be foreclosed from attempting to establish that appellate counsel’s failures affected the ultimate outcome of the appeal. Evidence relating to trial counsel’s performance should not be excluded on the basis of a previous determination because such evidence is relevant to an analysis of the claim of ineffective assistance of counsel as it relates to any prejudice resulting from the alleged deficient performance of appellate counsel.

CONCLUSION

Based upon the foregoing, the judgment of the criminal court denying the petition for post-conviction relief is reversed and remanded for further proceedings consistent with this opinion.

D. KELLY THOMAS, JR., JUDGE

³ We note that this case represents another instance of why this court has repeatedly warned petitioners and their counsel of the dangers of raising an issue of ineffective assistance of counsel on direct appeal. See Kendricks v. State, 13 S.W.3d 401, 405 (Tenn. Crim. App. 1999).